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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6891

VINCENZO BURRAFATO and
ANTONINA BURRAFATO,

Petitioners,

-against-

U.S. DEPARTMENT OF STATE and U.S.
IMMIGRATION & NATURALIZATION SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 13, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at —— F. 2d —— (2nd, Cir., 1975) and is set forth in the Appendix hereto at pages A1 to A7. The opinion of the United States District Court for the Eastern District of New York is unreported and is set forth in the Appendix at pages A8 to A-16.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 13, 1975. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the United States District Court has jurisdiction over a claim by a United States citizen spouse that her Fifth Amendment rights were violated by the exclusion of her husband from the United States where such exclusion was procedurally defective and made in violation of law.

2. Whether the United States District Court is without jurisdiction of a suit by an alien to compel a federal agency to comply with its own regulations (which require that prior to denying an immigrant visa, the applicant must be informed of the reasons for the denial and provided with an opportunity for rebuttal) merely because the alien has been found to be "illegally" in the United States on the ground that he entered the country without being in possession of the very document which he claims was unlawfully denied to him by that agency.

3. Whether, in failing to specify which of the thirty-one possible grounds for exclusion contained in Section 212(a) of the Immigration & Nationality Act formed the basis of the Petitioner's exclusion from the United States, the Department of State violated its own regulations which require that reasons for the denial of a visa and an opportunity for rebuttal be provided to the alien.

4. Whether the constitutional right of United States citizens to hear the views of a foreign speaker [to protect which the Supreme Court found jurisdiction in *Kleindienst v. Mandel*, 408 U.S. 753 (1972)] is a greater right so as to confer jurisdiction than that of a United States citizen wife to have her husband's consortium and support, which rights were undisputedly denied to her in violation of law.

5. Whether the Court has jurisdiction, even if no constitutional right is deemed violated, to review a denial of a visa made in violation of law, where the alien is denied a right that Congress and the Department of State's own regulations confer upon him and results in depriving his United States citizen wife of her rights to consortium and support.

6. Whether the Court can refuse to consider the merits of the Petitioners' claim where the denial of an immigrant visa on the basis of "association with organized criminal society" does not as a matter of law constitute a ground of exclusion under the statute alleged, Section 212(a)(27) of the Immigration & Nationality Act, thus allowing an unlawful decision of the Department of State to remain unchallengeable.

RELEVANT STATUTE

Immigration & Nationality Act, 66 Stat. 163 (1952), as amended:

Section 212, 8 U.S.C., Section 1182—

> (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; . . .

RELEVANT REGULATION

Title 22, Code of Federal Regulations (C.F.R.)—

Section 42.130 Procedure in refusing visas.—

(a) *Refusal Procedure* . . . When an immigrant visa is refused, an appropriate record shall be made in duplicate on a form prescribed by the Department which shall be signed and dated by the consular officer. The applicant shall be informed of the provision of law, or regulation issued thereunder, on which the refusal is based, and of any statutory provisions under which administrative relief is available. If the grounds of ineligibility may be overcome by the presentation of additional evidence and if the applicant indicates that he intends to submit such evidence, the original of Form FS-510 and the documents attached thereto may in the discretion of the consular officer and with the consent of the applicant be retained in the consular files for a period not exceeding 120 days after which time the original Form FS-510 and supporting documents shall be forwarded to the applicant if the refusal has not in the meantime been overcome. . . .

(b) *Review of Refusals at Consular Offices.* If the grounds of ineligibility may be overcome by the presentation of additional evidence, and if the applicant has indicated that he intends to obtain such evidence, a review of the refusal may be deferred for a period not to exceed 120 days. If the principal consular officer, or his alternate, does not concur in the refusal, he shall (1) refer the case to the Department for an advisory opinion, or (2) assume responsibility for the case himself.

(c) *Review of refusals by the Department.* The Department may request a consular officer in an individual case or in specified classes of cases to submit a report if an immigrant visa has been refused. The

Department will review such reports and may furnish an advisory opinion to the consular officer for his assistance in giving further consideration to such cases. If upon the receipt of the Department's advisory opinion the consular officer contemplates taking action contrary to the advisory opinion, the case shall be resubmitted to the Department with an explanation of the proposed action. *Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers.* (emphasis added)

STATEMENT OF THE CASE

The Petitioner, Vincenzo Burrafato (hereinafter, "Burrafato") is an alien, a native and citizen of Italy. In 1961, he was married in Italy to the co-Petitioner, Antonina Burrafato, a citizen of the United States. Petitioners are the parents of two children born in Italy , oth of whom are now lawful permanent residents of the United States. Based on the marriage, the Immigration & Naturalization Service (hereinafter, the "Service") approved the status of Burrafato as the spouse of a United States citizen, the first step of eligibility in the procedure for conferring permanent resident status based upon a marriage to a United States citizen.

On or about February 1970, Burrafato applied at the American Consulate in Palermo, Italy for an immigrant visa to enter this country. While this application was pending, Burrafato's wife and children returned to the United States in January 1971. Without stating any reasons or providing any justification for his action, the United States consul subsequently informed Mr. Burrafato that his visa application had been denied. On or about October 21, 1971, in response to prior counsel's request for reconsideration, the Visa Office of the Department of State informed the Petitioners by letter that upon review:

> "[N]o facts were disclosed which would warrant a reversal of the original finding of ineligibility under Section 212(a) of the Immigration and Nationality Act." (A17)

As a result of the unbearable separation from his wife and children, and because of the frustration engendered by not knowing *why* he was found ineligible for admission to the United States, Burrafato left Italy and illegally entered the United States in an instinctive attempt to be reunited with his family. However, on or about December 7, 1972, the Service commenced deportation proceedings against him.

At the deportation hearing, Burrafato through his counsel, conceded he was deportable for having entered the United States without a valid visa, but he was awarded the privilege of voluntary departure by the Immigration Judge upon the required showing of his good moral character.

On June 4, 1974, the Petitioners commenced this action seeking declaratory and injunctive relief. However, on January 20, 1975, Judge Bruchhausen granted the Government's motion to dismiss the complaint for lack of jurisdiction* (A8, A16). Thereafter, on January 28, 1975, Judge Bruckhausen granted the Petitioners' motion to enjoin the Service, pending appeal, from deporting Burrafato or from withdrawing the privilege of voluntary departure until seven days following the issuance of the mandate by the Court of Appeals for the Second Circuit or any other extensions that may lawfully be granted.

On August 13, 1975, the Second Circuit rendered its opinion and affirmed the decision of the District Court (A1 to A7). Thereafter, the Second Circuit on September 25, 1975 and September 30, 1975 denied a petition for rehearing and a stay of

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*In the Government's affidavit filed in support of the motion, the Assistant United States Attorney stated that the basis of the denial was "association with organized criminal society". This was the first time that any basis whatsoever was made known to the Petitioners.

the mandate and on October 9, 1975, Mr. Justice Marshall denied a similar request. However, the Service has granted Burrafato an administrative stay until January 16, 1976.

REASONS FOR GRANTING THE WRIT

POINT I

THE DISTRICT COURT HAS JURISDICTION TO REVIEW A DECISION OF THE DEPARTMENT OF STATE TO DENY A VISA WHERE THE DENIAL IS PROCEDURALLY DEFECTIVE AND BASED ON AN ERROR OF LAW.

This case involves an attack on the decision of the Department of State in denying an immigrant visa to the spouse of a United States citizen where such a denial is made in total contravention of the Department of State's own regulations. It is important to keep in mind that the Petitioners are not seeking review of consular action, rather we are seeking revision of a *ruling of law* by the Department of State to deny a visa which ruling is controlling on the consul under 22 CFR §42.130(c).

The single ground upon which the complaint was dismissed was because the District Court determined that it lacked jurisdiction over the subject matter (A8 to A16). In affirming that decision the United States Court of Appeals for the Second Circuit conceded that the Petitioners have raised a substantial issue by their claim of denial of due process (A4). However, the Second Circuit determined that it lacked jurisdiction to consider the merits on the ground that the judiciary should not interfere with the policy of Congress in excluding aliens. In support of this conclusion, the Court relied upon the often-quoted language of *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895), cited with approval in *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), to the effect that the judiciary would not interfere with the legislative and executive policies regarding the exclusion of

aliens. However, this long-standing proposition has been held to apply where an attack is made on the *constitutionality, validity* or *efficacy* of a statute or policy. *No such attack is made herein.* To the contrary, the Petitioners rely upon an enactment of the executive branch embodied in 22 CFR Sec. 42.130 to support their claim that Burrafato had been denied procedural due process of law.

In *Kleindienst v. Mandel, supra,* the alien, Ernest Mandel, was denied a visa by the consul on the ground that he was ineligible for admission to the United States under Section 212(a)(28) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1182(a)(28).* The discretionary waiver of this ground of exclusion for non-immigrants as provided under Section 212(d)(3)(A) of the Act, 8 U.S.C. §1182(d)(3)(A), was also denied and as a result, Mandel and six United States citizens brought suit to review the denial of his visa. The plaintiffs alleged that the denial of the visa violated their First Amendment rights to hear and speak with Mandel. The Supreme Court, in reaching the merits of that claim, reviewed the decision of the Attorney General and the Department of State, to see whether the denial of the waiver, and hence the denial of the visa, was supported by "a facially legitimate and bona fide reason" (408 U.S. at p. 770). Thus, reliance by the District Court upon *Mandel* to support its finding of lack of jurisdiction is totally misplaced, since this Court held that it had jurisdiction to examine the merits of the visa denial.

The Second Circuit, in an attempt to distinguish *Mandel* held that no constitutional right of an American citizen was "implicated" herein. In so holding, the Court rejected the argument of the co-Petitioner, Antonina Burrafato, that her Fifth Amendment rights of due process and equal protection of the law were denied to her. She claims that by denying a visa to her

*That section makes aliens who advocate, *inter alia,* anarchism or the violent overthrow of the United States Government ineligible from admission to this country.

husband without providing him procedural due process, her rights to consortium as well as to the comfort and support of her husband represents to her an unlawful deprivation of "life, liberty or property, without due process of law", and a denial of equal protection of the law under the Fifth Amendment.

In rejecting the claim by Mrs. Burrafato, the Court of Appeals found it sufficient to merely refer to its recent decision in *Noel v. Chapman*, 508 F.2d 1023, 1027-28 (2d Cir. 1975). However, in *Noel* that Court specifically *found jurisdiction* to review the merits and merely refused to overturn the decision of the Immigration Service which had acted in *accordance* with its stated policy. In the present case, no such policy of the Service or the Department of State is under attack. Furthermore, in the present case, the Circuit Court *found no jurisdiction* to consider the merits and, of even greater significance, the actions of the Department of State complained of herein, are undisputedly *contrary* to its own regulations and therefore in *violation* of law (22 CFR Sec. 42.130).

The regulations promulgated by the Department of State in 22 C.F.R. §42.130 govern the procedures to be followed in denying a visa. Of course, it is undisputed that these regulations have the force and effect of law. *Boske v. Comingore*, 177 U.S. 459 (1900); *California Commission v. United States*, 355 U.S. 534, 524-543 (1958). Pursuant to 22 C.F.R. §42.130(a), an individual whose request for a visa has been denied, is entitled to be "informed of the provision of law, or regulation issued thereunder, on which the refusal is based". As previously stated, Burrafato was not informed of the particular basis for the denial until more than three years after his visa was denied.

Moreover, the clear intent of the regulations envisions disclosure of the adverse information in order that the applicant for the visa may present additional evidence to overcome the denial. If the applicant is not provided with the particular information which he must rebut, then the regulation allowing such an opportunity would be meaningless.

Furthermore, the original basis disclosed by the Department of State in denying Burrafato's application for a visa was set forth in the Department's letter of October 21, 1971 (A17). The letter claimed that the visa was denied under Section 212(a) of the Act, 8 U.S.C., §1182(a). However, that section contains the general classes of aliens ineligible to receive a visa and excludable from admission to the United States. That section is broken down into thirty-one subdivisions, including by way of illustrating the variety of causes, aliens who are mentally retarded, insane, sexual deviates, drug addicts, criminals, Communists, etc. It was not until some three years later that the Government in its affidavit in support of the motion to dismiss the complaint, chose to further refine the denial and limit the ground to Section 212(a)(27) of the Act, 8 U.S.C. § 1182(a)(27). Thus, by failing to disclose the particular subsection alleged, Burrafato was effectively precluded from knowing the basis of the visa denial in direct contravention of the regulation. Moreover, as of this date, no factual information to support this determination has ever been provided to Petitioners.

As previously indicated, although the original denial letter from the Department of State only referred to the general exclusion statute, Section 212(a) of the Act, 8 U.S.C. §1182(a), the Government in its affidavit in support of the motion to dismiss the complaint, characterized the ground for the denial as:

> ". . . pursuant to Section 212(a)(27) [association with organized criminal society] of the Immigration and Nationality Act . . . "

The Government's affidavit further stated that the basis of this belief was the files and records of the Immigration and Naturalization Service and the Department of State.

The Petitioners contend that it is a manifest and flagrant violation of law for the Department of State to rule that "association with organized criminal society" constitutes a ground of exclusion which Congress intended to include within the purview of Section 212(a)(27) of the Act, 8 U.S.C. §1182(a)(27).

The legislative history of this subsection is reflected in the *U.S. Code Cong. & Admin. News*, Vol. 2, p. 1703 (1952), as follows:

> "Paragraphs (27), (28) and (29) of Section 212(a) incorporate the provisions of Section 1 of the Act of October 16, 1918, as amended by Section 22 of the Subversive Activities Control Act of 1950, relating to the *exclusion of subversives.*" (emphasis added)

The Act of 1918 applied to aliens who advocated or were members or affiliates of organizations which advocated violent overthrow of the United States Government, 1 Gordon & Rosenfield, *Immigration Law and Procedure*, Sec. 2.47, p. 2-222.

The subversive Activities Control Act of 1950, 50 U.S.C., Section 781, et seq., pertains strictly to the control of Communists. In *Kleindienst v. Mandel, supra*, the Supreme Court made the following statement which further clarifies such purpose:

> "In the years that followed, after extensive investigation and numerous reports by Congressional Committee . . . , Congress passed the Internal Security Act of 1950, 64 Stat. 987. This Act dispensed with the requirement of the 1940 Act of a finding in each case, with respect to members of the Communist Party, that the party did in fact advocate violent overthrow of the Government. These provisions were carried forward into the Immigration & Nationality Act of 1952."

The Court went on to state:

> "We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of increasing control with particular attention, for almost 70 years now, first to anarchists and then to those with Communist affiliation or views." (408 U.S. at 761).

What emerges from an analysis of the legislative history of Section 212(a)(27), is that Congress was concerned entirely with the exclusion of *political* subversives. There is not a single sentence contained anywhere in the legislative history tending to indicate that Congress, in drafting Section 212(a)(27) was seeking to exclude those engaging in ordinary criminal conduct, or those associating with people engaging in such conduct.

We submit that the proper approach to determine the scope of a provision contained in Section 212(a) was that taken by this Court in *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967). *Boutilier* involved a determination, within the context of a deportation proceeding, of whether or not the statutory words, "afflicted with a psychopathic personality" contained in Section 212(a)(4) of the Act, 8 U.S.C. §1182(a)(4), applied to an alien who was admittedly a homosexual. In determining that the alien's behavior *did* fall within Section 212(a)(4), this Court made an exhaustive analysis of the legislative history of that provision in order to determine the Congressional intent. The Court's conclusion was, therefore, based squarely on the various statutes, bills, and committee reports cited in the opinion. (387 U.S. at 120-123).

In the present case, a similar analysis of the legislative history of Section 212(a)(27) demonstrates that the conduct of which the alien has been accused, clearly does *not* come within the Congressionally intended ambit of the provision in question. For the reasons previously indicated, there is no question that Congress was concerned exclusively with threats to the national interest derived from political subversive activities. Accordingly, the State Department's ruling, including "association with organized criminal society" within the provisions of Section 212(a)(27) was contrary to the intent of that section, and an error of law.

Furthermore, the conclusion that "association with organized criminal society" was not included in Section 212(a)(27) is also

demonstrated by the fact that Congress has provided for exclusion of those involved with criminality in *other* subdivisions of Section 212(a). [Sections 212(a)(9), (10) and (23), 8 U.S.C. §1182(a)(9), (10) and (23).]

POINT II

THE CIRCUIT COURT'S FINDING THAT ONLY ALIENS "LEGALLY" IN THE UNITED STATES ARE ENTITLED TO PROCEDURAL DUE PROCESS IS CONTRARY TO LAW

In declining to find subject matter jurisdiction, the Circuit Court stated that:

> "If Vincenzo [Burrafato] were 'legally' within the United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations. But he is not here legally." (A6)

However, as has long been held, an alien is entitled to the same constitutional protections of life, liberty and property under the due process clause as is afforded to citizens, and in defining this constitutional guarantee, the Supreme Court has held that "Fair Play" is the essence of due process. *Galvan v. Press*, 347 U.S. 522, 530 (1954). Furthermore, the Second Circuit has previously reacted severely against unlawful Government activity in order "to prevent district courts from themselves becoming accomplices in willful disobedience of law". *United States v. Toscanino*, 500 F.2d 267 (2nd Cir. 1974). There, the Court in reaffirming the doctrine that aliens in the United States may invoke the Fourth Amendment protection against illegal searches and the Fifth Amendment guarantee of due process stated, "No sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct. . . . " *United States v. Toscanino, supra*, at p. 280.

If the Second Circuit is sustained in its holding that an alien illegally in this country is denied access to the Courts to compel a governmental agency to abide by its regulations, it would render the regulations wholly meaningless and totally unenforceable. In essence then, although the executive branch has created a right, the aggrieved party would have no remedy.

The Petitioners strongly urge this Court that a finding of jurisdiction to review matters of law is essential to avoid granting unlimited immunity from judicial examination of arbitrary decisions made by a consular or State Department official in violation of law or regulations. A rejection of jurisdiction by the Courts leaves officials of the Department of State, unlike officials of any other agency, free to violate the law with impunity. As the Court in *Golobek v. Regional Manpower Aaministration, United States Department of Labor*, 329 F. Supp. 892 (E.D. Pa. 1971) stated in finding jurisdiction to review the denial of a labor certification:

> "The court's initial finding must be whether it has jurisdiction to review a determination relegated to the Secretary of Labor. . . . Previous cases have not squarely decided this problem. However, several have held that there is a general tendency to favor judicial review of administrative action which is especially powerful in immigration and naturalization cases. *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961), involved the excluding of an alien who was in possession of a visa. The court stated that the effect of the Administrative Procedure Act and the Immigration Act was to make available judicial review of agency action relating to immigration. It then found that a court of law was the proper place to test unauthorized administrative power. (329 F.Supp. at 894)"

The Court went on to state:

> "An administrative decision based upon erroneous legal standards cannot stand: *SEC v. Chenery Corp.*,

> 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943). A denial of any review would leave petitioner helpless and subject to deportation despite the possible merits of the underlying case. (329 F. Supp. at 894)

Vincenzo Burrafato's plea to this Court is simple but desperate. He concedes, as he did before the Service, that he entered this country unlawfully and he is willing to leave voluntarily as provided by the Immigration Judge. Recognizing that he must leave as the law requires, he only asks that the Department of State also abide by the law. It should also be noted that this eleventh hour plea represents his last hope for ever returning to this country and bringing up his children as good, law-abiding citizens under his supervision. He does not seek additional time solely in the hope that he can obtain some immigration benefit, as none seems to be foreseeable. If the decision of the Circuit court is left undisturbed, a precedent wherein the State Department may violate the law with impunity, and abrogate the right of an American wife to the presence of her alien husband, will be perpetuated, and will adversely effect the lives not only of *these* petitioners, but of numerous other individuals who may not have the inclination or resources to bring the matter to the doorstep of this Court. We respectfully call upon this Court to rule that in late Twentieth Century, post Watergate America, *no* Federal Agency is above the law, or immune from judicial review.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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